

<b>Fireman's Fund Ins. Co. v Genco Bldrs. Inc.</b>
2022 NY Slip Op 34017(U)
November 28, 2022
Supreme Court, New York County
Docket Number: Index No. 159943/2021
Judge: William Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. WILLIAM PERRY PART 23

Justice

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FIREMAN'S FUND INSURANCE COMPANY A/S/O HENRY GAMERMAN AND KARINA WOJDYLAWSKI, CHUBB NATIONAL INSURANCE COMPANY A/S/O HENRY GAMERMAN AND KARINA WOJDYLAWSKI

Plaintiff,

- v -

GENCO BUILDERS INC., MIGUEL VELARDE PIPING & HEATING, INC.,

Defendant.

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INDEX NO. 159943/2021
MOTION DATE 12/14/2021
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18

were read on this motion to/for CHANGE VENUE.

In this subrogation action, defendant Miguel Velarde Piping & Heating, Inc. (Miguel Velarde) moves, pursuant to CPLR 510 (1) and 511, to change the venue of this action from New York County to Nassau County. The motion is denied.

Plaintiffs Fireman's Fund Insurance Company (Fireman's) and Chubb National Insurance Company (Chubb) bring this action on behalf of their insureds, Henry Gamerman and Karina Wojdylawski (NY St Cts Elec Filing [NYSCEF] Doc No. 13, amended complaint ¶¶ 1, 3). Plaintiffs allege that the insureds retained defendants Genco Builders Inc. and Miguel Velarde to perform certain renovation work at the premises located at 225 View North, Lawrence, New York, which is located in Nassau County (id., ¶¶ 10, 13). According to plaintiffs, on January 23, 2019, defendants' renovation work caused water to discharge and flow into the premises, causing

property damage in excess of \$394,744.49 (*id.*, ¶ 14).<sup>1</sup> The supplemental summons indicates that the basis for venue is plaintiffs' residence.

CPLR 503 (a) provides that:

“Except where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when it was commenced; the county in which a substantial part of the events or omissions giving rise to the claim occurred; or, if none of the parties then resided in the state, in any county designated by the plaintiff.”

“On a motion to change venue, pursuant to CPLR 510 (1), defendant's burden . . . is limited to establishing that the designated county is improper” (*IME Watchdog, Inc. v Baker, McEvoy, Morrissey & Moskovits, P.C.*, 145 AD3d 464, 465 [1st Dept 2016] [internal quotation marks and citation omitted]). “Only if a defendant meets this burden is the plaintiff required to establish, in opposition, that the venue selected was proper” (*Williams v Staten Is. Univ. Hosp.*, 179 AD3d 869, 870 [2d Dept 2020]).

The principal office of a foreign corporation is found in its application for authority to do business filed with the Secretary of State (*see e.g. Nadle v L.O. Realty Corp.*, 286 AD2d 130, 132 [1st Dept 2001]), except for a foreign insurer, which is not required to designate a principal place of business in its application (*Valley Psychological, P.C. v Governmental Employees Ins. Co.*, 95 AD3d 1546, 1548 [3d Dept 2012] [“Defendant is a foreign (insurance) corporation and is not required to designate a principal place of business in such a certificate”]; *Providence Washington Ins. Co. v Squier Corp.*, 31 AD2d 514, 514 [1st Dept 1968] [venue was proper

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<sup>1</sup> After Miguel Velarde made its motion, plaintiffs served a supplemental summons and amended complaint on January 6, 2022, adding Chubb as a party plaintiff (NYSCEF Doc No. 13). Miguel Velarde does not argue, in reply, that plaintiffs were required to seek leave of court to add Chubb as a party plaintiff (NYSCEF Doc No. 18 at 2-3). Even if plaintiffs were required to obtain leave of court, “a failure to obtain leave of the court may be waived and is not fatal in all cases” (*Santopolo v Turner Const. Co.*, 181 AD2d 429, 429 [1st Dept 1992]). In fact, Miguel Velarde answered the amended complaint and did not assert that the amended complaint was a nullity (NYSCEF Doc No. 19).

where “it appears that plaintiff (foreign insurer) maintains its principal office for the conduct of its business in this State in New York County”]; *Dubiac v Travelers Ins. Corp.*, 121 Misc 2d 1090, 1091 [Sup Ct, NY County 1983] [venue was appropriate in New York County where insurer maintained its principal office]).

Even if Miguel Velarde met its burden, plaintiffs have demonstrated that their choice of venue is appropriate (*see Providence Washington Ins. Co.*, 31 AD2d at 514). Howard Wilson (Wilson), a claims examiner employed by Chubb Ltd., avers that Chubb wrote the subject policy for the premises (NYSCEF Doc No. 17, Wilson aff, ¶ 6). Wilson states that Chubb is a “domestic corporation organized under the laws of the State of Indiana, with its principal place of business at 202B Hall’s Mill Road, Whitehouse Station, NJ 08889, and was at all times hereinafter licensed to issue policies of insurance in the State of New York” (*id.*, ¶ 4). Wilson indicates that Fireman’s was and is a “domestic corporation organized under the laws of the State of California, with its principal place of business at 1465 N. McDowell Blvd., Ste 100, Petaluma, CA 94954, and was at all times hereinafter licensed to issue policies of insurance in the State of New York” (*id.*, ¶ 3). He states that Fireman’s and Chubb maintain offices at 1133 Avenue of the Americas in Manhattan, which has been designated as their “statutory home office” and main administrative office (*id.*, ¶ 5). Based upon this affidavit, plaintiffs have demonstrated that Chubb maintains a principal place of business in the state in New York County.

Even though Wilson’s affidavit does not contain a certificate of conformity pursuant to CPLR 2309 (c), the absence of such a certificate is a mere irregularity and is not a fatal defect (*Matapos Tech. Ltd. v Compania Andina de Comercia Ltda*, 68 AD3d 672, 673 [1st Dept 2009] [stating that “the courts are not rigid about this requirement”]). Given that Miguel Velarde has not identified any prejudice, the court ignores this irregularity (*see* CPLR 2001; *Sebrow v*

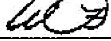
*Sebrow*, 205 AD3d 563, 564 [1st Dept 2022]; *Charnov v New York City Bd. of Educ.*, 171 AD3d 409, 409-410 [1st Dept 2019]).

Plaintiffs’ request to remove Fireman’s from the complaint is denied. Indeed, plaintiffs did not file a notice of cross motion and only requested this relief in their affirmation in opposition. “It is not as a rule sufficient to demand such relief in opposing affidavits or memoranda; an outright notice is required, to avoid any surprise at all to the original movant” (*Guggenheimer v Guggenheimer*, 109 AD2d 1012, 1013 [3d Dept 1985] [internal quotation marks and citation omitted]).

Accordingly, it is

**ORDERED** that the motion (sequence number 001) of defendant Miguel Velarde Piping & Heating, Inc. to change venue is denied; and it is further

**ORDERED** that plaintiffs’ request to remove Fireman’s Fund Insurance Company as a plaintiff is denied.

<u>11/28/2022</u> DATE		 WILLIAM PERRY, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE